

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6049

To be argued by
J. CHRISTOPHER JENSEN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-6049

County of Suffolk, County of Nassau, et al.,

Appellees, *B*

- against -

Secretary of the Interior, et al., *PLS*

Appellants,

National Ocean Industries Association,
et al.,

Intervenor-Appellants.

The Natural Resources Defense Council, Inc.,

Appellees,

- against -

Thomas S. Kleppe, Secretary of the Interior,

Appellant,

National Ocean Industries Association, et al.,

Intervenor-Appellants.

On Appeal from the United States District
Court for the Eastern District of New York

REPLY BRIEF FOR FEDERAL APPELLANTS

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ARGUMENT

The appellees have not introduced any novel arguments in their voluminous briefs filed in defense of Judge Weinstein's Final Memorandum Decision and Order voiding OCS lease Sale 40. However, we believe that a few basic issues were treated by the appellees in a confused and erroneous manner in their briefs and require some concise clarification.

The first such issue arises from the appellees' contention that the Federal appellants have ignored certain Guidelines of the President's Council on Environmental Quality (CEQ), 40 C.F.R. §1500.8 et seq., that are allegedly dispositive of this appeal. (Brief of Natural Resources Defense Council, pp. 39, 61; Brief of Nassau County, pp. 3, 15-19, 22-26, 32-34; Brief of Suffolk County, p. 76). Of course, this Court has consistently recognized that these Guidelines are merely advisory, because CEQ "has no authority to prescribe regulations governing compliance with NEPA." Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 421 (2d Cir. 1972) (Greene I); Natural Resources Defense Council v. Callaway, 524 F.2d 79, 86, fn. 8 (2d Cir. 1975), although these Guidelines are to be given great weight by this Court in interpreting NEPA's requirements. (Id.)

Appellees' citation of these Guidelines, however, does not materially alter the issues presented by this appeal for the simple reason that the Federal appellants do not contest the applicability of the Guidelines. Even under the Guidelines, the question presented by this appeal is still whether the discussion in the 40 EIS on the various topics satisfies NEPA's "rule of reason" (i.e., whether the 40 EIS adequately analyzes potential onshore impacts, impacts on population, relationship between the federal proposal and local land-use controls, and legislative alternatives to the proposal, etc.). It is simply not true that the 40 EIS fails to discuss the topics suggested in the CEQ Guidelines.

For example, despite appellees' protestations to the contrary (Nassau County Brief, pp. 22-23, NRDC Brief, p. 39), the 40 EIS does generally discuss the relationship between OCS Sale 40 and State and local land use controls. See Brief of Federal Appellants, pp. 17-21.

Similarly, the 40 EIS contains a description of the proposed action (I 40 EIS 1-61), description of the environment affected (I 40 EIS 62-621), an assessment of onshore impacts, including population and economic impacts, (II 40 EIS 216-386), Technical Paper No. 1, referenced at II 40 EIS 235) -- in short, all of the topics recommended by the CEQ Guidelines cited by appellees. Our research has failed to unearth a single decision invalidating a major Federal action for utterly failing to follow procedures

recommended in the CEQ Guidelines, let alone any decision invalidating Federal action for failing to respond adequately to CEQ recommendations.

Finally, the most telling response to appellees' reliance on the CEQ Guidelines is the testimony of Dr. Russell Peterson, former Chairman of CEQ, who was deposed in this action by the appellees. Dr. Peterson was questioned by counsel for appellees' primarily on the subject of separating exploration and development of OCS oil and gas. On that subject, Dr. Peterson testified that he believed that it would be desirable to have some "clear separation" between exploration and development decisions because "the information which is vital to determining the impact of development is not acquired until after it -- much of it until after the preliminary part of the exploration is completed." (J.A. 2124). Dr. Peterson was satisfied, however, that Interior was achieving this separation of development decisions by its procedure of requiring the submission of development plans prior to the approval of any development activities by the offshore lessees. ("The present system is currently being operated and projected and will accomplish the goal which we were recommending." J.A. 2130; See also J.A. 2128-2129, 2136, 2144-2146).

The real significance of Dr. Peterson's testimony for the instant appeal is his view, as the then Chairman of CEQ, that OCS oil and gas lease operations present unique problems for environmental study under NEPA. Thus, Dr. Peterson expressly recognized that it is not possible to

study certain potential environmental impacts of OCS development activity in very much "site-specific" detail until the results of the exploratory phase are obtained:

... [w]hen one does not know whether there is any oil or gas on the Outer Continental Shelf, it is difficult to get very serious about the impact methods and results.

Secondly, to focus in on what may be an onshore impact and what magnitude once oil has been discovered and make some estimate of the quantity that might be there and the land use has been developed for where that might be brought ashore and how [sic].

Then, one is in a much better position to judge the impact. (J.A. 2124-2125)

As a result, Dr. Peterson recommended the very environmental impact study procedure that was followed by Interior for lease sale 40. This procedure is the three-step process of first developing a very general programmatic EIS on the decision to accelerate OCS leasing, then preparing an "area" EIS on the proposed lease sale area and finally preparing an environmental assessment, or possibly a full-blown EIS, on the development plans submitted by OCS lessees if oil and gas is discovered in commercial quantities. (See Peterson deposition, J.A. 2127-2128).

Both the current Administration and the previous one have expressed their commitment to follow this three stage environmental study procedure recommended by Dr. Peterson on behalf of CEQ. In an affidavit filed with this Court on the prior appeal and considered by Mr. Justice Marshall in his

decision on that appeal. State of New York v. Kleppe, ____
U.S. ____, 97 S. Ct. 4, 7, fn. 3 (1976), former Secretary
Kleppe stated that he was committed to requiring an environ-
mental assessment and, if necessary, a full-blown EIS prior
to approving any development plans for lease Sale 40. (A
copy of Secretary Kleppe's affidavit is annexed hereto).
Secretary Andrus has extended this commitment by announcing
that a separate and complete EIS on the "site-specific"
impacts of proposed sale 40 development, including pipelines,
will be prepared and publicly circulated before any develop-
ment of the sale 40 area is approved under the Secretary's
regulations. (J.A. 3650).

In the last analysis, appellees and Judge Weinstein
would have Interior study in detail the "site-specific" impacts
of the onshore development activity, such as pipeline con-
struction, prior to the lease sale decision itself. Dr.
Peterson was asked this question by appellees in a slightly
different form when they asked if there would be an advantage
in requiring development plan approval prior to leasing. He
responded as follows:

There would be a disadvantage in doing
that, in my view, because you would
have too little information on which
to base that decision.

You cannot even talk seriously about
what kind of onshore and offshore
impact there will be until you know
whether any oil was out there or not or
how much oil was out there, where the
platform would be located, where the
pipeline would come ashore, and who is
going to develop such a proposal until
he knows whether there is any oil there
or not. (J.A. 2133).

We agree with appellees' contention that CEQ's views of NEPA's requirements are to be given great weight by this Court. We believe, however, that Dr. Peterson's views on this particular Federal Proposal, which were incorporated in his testimony before a Congressional subcommittee considering amendments to the OCS Lands Act (J.A. 2121-2122) and which were deprived from a six volume CEQ study of the environmental impacts of OCS oil and gas leasing (Exhibit Q, J.A. 3521), are far more significant than the general CEQ Guidelines cited by appellees.

The second issue distorted by the discussion in appellees' briefs involves the question of whether Interior was required to study the environmental impacts of specific pipeline routes and of the alternatives of separating exploration and development prior to selecting tentative tracts for possible leasing. (Brief of NRDC, pp. 12, 29-30). This issue arises from Judge Weinstein's conclusion that the government "neglected to examine the potential environmental effect of offering, and accepting bids on, tracts other than those actually proposed and leased." (J.A. 71).

There is a simple, but fundamental error in Judge Weinstein's finding and in appellees' argument. Tract selection is the process by which Interior defined the proposal for federal action that was then studied in accordance with the requirements of Section 102(2)(c) of

NEPA, 42 U.S.C. §4332(2)(c). Judge Weinstein and the appellees may well be dissatisfied with Interior's proposal to lease certain tracts of submerged land rather than other allegedly environmentally more desirable tracts, but there can be no doubt after the Supreme Court's decision in Kleppe v. Sierra Club, 427 U.S. Part 2, p. 390 (1976), that Interior is not obliged to engage in a Section 102(2)(c) environmental analysis prior to the development of a proposal for Federal action. Id. at p. 404-406. Accord, Aberdeen & Rockfish Railroad Co. v. SCRAP (SCRAP II), 422 U.S. 289, 320 (1975).

Interior did take into consideration some major environmental conflicts in defining the proposal because this type of general environmental analysis is required by Interior's own regulations governing tentative tract selection, 43 C.F.R. §§3301.2 and 3301.3, and may be required by the general policy contained in Section 101 of NEPA, 42 U.S.C. §4321 et seq. The focus of the tentative tract selections, however, was admittedly the identification of tracts considered to have a high geologic potential for containing producible hydrocarbons. It is illogical to imply that Interior should initially select tracts on an environmental basis and then determine whether these "desirable" tracts display and potential for oil and gas.

On the contrary, the only rational way to proceed is to select tracts according to their hydrocarbon potential and then to subject these proposed tracts to an environmental impact study under Section 102(2)(c) of NEPA before deciding which tracts, if any, to lease.

Simply because the information developed in the 40 EIS and PEIS concerning environmental impacts and legislative alternatives did not lead to the further deletion of tracts, it does not follow that the Secretary "neglected to examine" the possibility of eliminating some tracts for those environmental reasons adduced in the two impact statements.

Judge Weinstein's conclusion in this regard is particularly suprising in view of the fact that it is clear from other OCS cases cited to him that tracts for a proposed lease sale are often eliminated after the Secretary has prepared and considered an environmental impact study of the proposal. For example, in State of Alaska v. Kleppe, _____ F. Supp. _____, 9 ERC 1497 (D.D.C. 1976), Judge Waddy in the District of Columbia specifically noted that, after consideration of the EIS for OCS Sale 39 in the Gulf of Alaska and the public comments thereon, the Secretary reduced the proposed lease sale area by 40 percent. Id. 9 ERC at 1499.

Obviously, it was error for Judge Weinstein to cite

the testimony of a staff employee involved only in tentative tract selection for the proposition that the Secretary did not consider potential onshore impacts in relation to the possibility of deleting tracts for leasing. To the extent that onshore impacts could be studied, they are studied in the 40 EIS. If these potential onshore impacts had any significance for determining the location of tracts to be leased within the sale area, as they did in the Gulf of Alaska Sale 39, then tracts would have been deleted by the Secretary when he approved the lease sale. The short response to Judge Weinstein's criticism is that the potential onshore location of pipelines is simply not useful in determining the tracts to be leased because the oil and gas may always be collected through gathering lines before being transported by pipeline ashore or may even be transported ashore in tankers -- possibilities that are identified and environmentally analyzed in the 40 EIS. (II 40 EIS 17-18, 25-26, 30-33).

We would also like to comment briefly upon the issue of the allegedly inadequate "cost-benefit" analysis performed by the Secretary for lease sale 40. We completely concur in the discussion of the "cost-benefit" issue contained in Part IV of our co-appellant National Ocean Industries Association's reply brief. By invalidating the lease sale

on the ground of an allegedly faulty economic analysis contained in the sale 40 PDOD, Judge Weinstein created a draconian standard of judicial review that actually would exceed the rigors of direct substantive review were such review countenanced by this Court under NEPA. For even de novo substantive review would be limited to the question of whether, on balance, the decision to proceed with the lease sale was environmentally "good" or "bad". Presumably, if Sale 40 were found to be substantively "good", it would not matter that there were some mathematical inaccuracies in economic summaries employed by the Secretary in reaching this "good" decision.

By requiring a mathematically precise dollar and cents figure for the economic costs and benefits of the project, Judge Weinstein clearly exceeded the "cost-benefit" analysis required by NEPA which in the words of this Court is a "broadly defined cost-benefit analysis" that "seeks to insure that more than economic costs alone are considered." Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 387-388 (2d Cir. 1975).

The true cost-benefit balance that must be struck here is the balance between all of the potential "cost" of the environmental impacts set out in "encyclopedic detail" in the 40 EIS (J.A. 186) and the "benefit" of satisfying

the "national interest" in "relief of this country's energy crisis" (J.A. 355). If the environmental information in the 40 EIS "sufficiently apprised [the Secretary] of the overall dangers" of sale 40 exploration and development, as found by Judge Weinstein in his initial decision (J.A. 174), then we submit that "cost-benefit analysis" in the NEPA sense has been adequately performed no matter what one expert's view might be of a dollar figure projection for pipeline costs contained in a background memorandum like the PDOD.

Finally, we feel constrained to comment upon the issue of the Secretary's alleged lack of good faith in conducting the NEPA review of sale 40. Although Judge Weinstein, in his final decision, declines to base his decision on the Secretary's bad faith, he gratuitously describes at length the "strong circumstantial evidence that the decision to proceed with sale 40 was made without considering the NEPA documents ..." (J.A. 105). This evidence is now cited to this Court by appellees in support of their arguments that the 40 EIS is generally insufficient under NEPA. (Brief of Suffolk County, pp. 49-50; Brief of NRDC, pp. 81-82).

In support of his view that the Secretary's NEPA activities were "but a charade", Judge Weinstein cites

various Presidential speeches, policy statements and government memoranda as the circumstantial evidence "that the decision to lease was a foregone conclusion once Presidents and those in their administrations including successive Secretaries of the Interior, decided some years ago that production of Atlantic hydrocarbons should proceed speedily." (J.A. 98). This evidence is identical to the evidence before him on the preliminary injunction.

In fact, Judge Weinstein is literally quoting himself verbatim from his prior decision on the preliminary injunction (J.A. 187). Although this would appear at first blush merely to represent judicial economy and consistency, it is in fact one of the more bizarre aspects of Judge Weinstein's final decision because he actually quotes himself out of context. In both decisions, Judge Weinstein begins with the identical announcement that there is circumstantial evidence of a charade (J.A. 98 and J.A. 187). There the similarity between the two opinions stops. In his first decision, Judge Weinstein goes on to conclude that "[n]evertheless, on balance, the court has not been convinced that the Secretary and his subordinates did not attempt to execute NEPA honestly." (J.A. 187-188). He then

analyzes the same Presidential statements relied upon in his final decision for evidence of bad-faith and concludes just the opposite:

As a practical matter there is no way the President can be restrained from setting national goals before he has been fully advised through an EIS. Faced with a grave international threat and disastrous impact on our economy, we cannot say that two Presidents should have remained silent. Even though events proved the grandiloquent Presidential promise of rapid self-sufficiency in energy an empty one, it was no violation of NEPA to attempt to mobilize the nation to meet a severe challenge. (J.A. 188).

Similarly, he concluded in his first decision that the internal memoranda of various government officials offered in support of the view that the decision to lease was reached prior to the completion of the EIS were not persuasive:

It must be recognized that both the accelerated program and Sale No. 40 involve significant political considerations of widespread interest. As a result, it is not realistic to assume that discussion and debate among high public officials and decisionmakers will not take place prior to a final decision. The fact that this dialogue precedes the decision and was engaged in by the eventual decisionmaker does not, as plaintiffs assert, indicate that the Secretary cannot consider the environmental data presented him with good faith objectivity. (J.A. 189).

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In view of the fact that the appellees did not offer one shred of additional evidence on this subject at the final trial on the merits, Judge Weinstein's complete reversal of his earlier decision concerning the good faith of the then Secretary of the Interior is inexplicable, and should not be given any serious consideration by this Court.

We can only surmise that this sudden change of position was an effort to reinforce a decision previously reversed by this Court.

CONCLUSION

It is respectfully submitted that the final judgment of the District Court declaring OCS lease Sale 40 null and void and granting a permanent injunction under NEPA should be reversed and judgment should be entered dismissing the complaints herein.

Dated: Brooklyn, New York
April 15, 1977.

Respectfully submitted,

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ADDENDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
COUNTY OF SUFFOLK, et al.,

Plaintiffs,

-against-

DEPARTMENT OF THE INTERIOR, et al.,

Defendants.
-----X

Civil Action
No. 75 C 208

THE STATE OF NEW YORK and THE NATURAL
RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs,

-against-

THOMAS S. KLEPPE, Secretary of the
Interior,

Defendant.
-----X

Civil Action
No. 76 C 1229

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA }

Affidavit of Thomas S. Kleppe

THOMAS S. KLEPPE, being duly sworn, deposes and states the
following:

1. I am the Secretary of the Interior, and have been through-
out the period of time the matters discussed herein occurred.

2. In advance of my decision on June 28, 1976 to hold OCS
lease sale number 40, on August 17, 1976, I received the following
documents on the dates indicated:

- A. Final Environmental Statement -- received
on June 22, 1976.
- B. Program Decision Option Document -- received
on June 22, 1976.

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C. Memorandum from the Assistant Secretary, Program Development and Budget, on higher royalty rates -- received on June 25, 1976.

D. Decision memoranda from the Assistant Secretary, Program Development and Budget, including as attachments the recommendations of:

- a) Director, Bureau of Land Management.
- b) Assistant Secretary, Energy and Minerals.
- c) Acting Deputy Director, Fish and Wildlife Service, and Assistant Secretary, Fish and Wildlife and Parks.
- d) Deputy Assistant Secretary, Management.
- e) Associate Director, Park System Management, and Assistant Secretary, Fish and Wildlife and Parks.
- f) Acting Assistant Secretary, Land and Water Resources.
- g) Assistant Secretary, Program Development and Budget.
- h) Director, Geological Survey.

-- received on June 22, 1976.

E. Memorandum from the Acting Director, Geological Survey, on potential geologic hazards -- received on June 25, 1976.

3. On June 28, 1976, I was briefed on the issues discussed in the Program Decision Option Document, and the Final Environmental Statement, on proposed OCS sale number 40.

4. There was a general discussion of those issues between myself and those in attendance at the briefing:

- a) H. Gregory Austin, Solicitor.
- b) Nathaniel P. Reed, Assistant Secretary, Fish and Wildlife and Parks.

- c) Ronald G. Coleman, Assistant Secretary, Program Development and Budget.
- d) James Gill, Deputy Assistant Secretary, Energy and Minerals.
- e) Chris Farrand, Deputy Assistant Secretary, Land and Water Resources.
- f) Al Powers, Director, Office of the Outer Continental Shelf Program.
- g) W. A. Radlinski, Associate Director, U.S. Geological Survey.
- h) Loren J. Rivard, Executive Assistant to the Secretary.
- i) Allan L. Reynolds, Director, Audit and Investigation.
- j) Sam Marler, Deputy Director, Public Affairs..
- k) William Moffat, Director, Office of Policy Analysis, Program Development and Budget.
- l) Roger Sindelar, Assistant to the Under Secretary.
- m) Edward Risley, Executive Secretariat staff.
- n) Members of U.S. Geological Survey, Bureau of Land Management. and OCS Program Office staff.

5. The issues of pipeline versus tanker movement of oil from the Federal OCS to points onshore, and resulting environmental impacts, were thoroughly discussed and considered at the June 28, 1976 briefing, with appropriate references being made to the treatment of those issues in the Final Environmental Statement, Program Decision Option Document, in-house recommendations accompanying the PDOD, and in the proposed lease stipulations to be included in any leases issued at sale number 40. The issue of State and local control over the location of pipelines and siting of onshore development-related facilities was given similar consideration.

6. The matter of State and local laws ultimately controlling the existence and location of pipelines from the Federal OCS to a point onshore, and the type and siting of onshore facilities relating to the development of OCS oil and gas, is a factor inherent in the leasing and development of the Federal OCS. I recognized throughout my consideration of OCS sale number 40 decision that State and local officials through their statutes, regulations, permits, and zoning ordinances can decide, in the final analysis, whether, where, and when, onshore facilities may be constructed and operated.

7. Contemporaneous with the consideration of proceeding with proposed OCS sale number 40, the Department was considering an impasse between the Exxon Corporation, U.S.A., and the California Coastal Zone Conservation Commission. Exxon, the holder of a Federal OCS oil and gas lease issued in 1968, had applied to the State Commission for a permit to operate a marine terminal and onshore storage and treatment facility in connection with the production of crude oil from the Santa Ynez Unit in the Santa Barbara Channel. The Department of Interior had already approved Exxon's plan of development, an onshore facility within State territorial waters and on State lands, and, as an alternative to the onshore treatment and storage facility, an offshore treatment and storage facility, upon the condition that Exxon, after making diligent good faith efforts, was unable to obtain permission from the appropriate State agencies to construct and operate the onshore facility under reasonable terms and conditions.

8. On June 24, 1976, four days prior to my decision to proceed with proposed OCS sale number 40, I received a memorandum from the Assistant Secretary - Program Development and Budget, requesting my decision on whether the State Commission had offered Exxon reasonable terms and conditions in a permit to operate a marine terminal and onshore storage and treatment facility. I was aware of the Exxon-State Commission permit matter prior to June 24, and viewed that situation as

being illustrative of the extent of control, even to the point of being a veto power, which States and local governments could exercise over the location of pipelines and siting of onshore facilities.

9. At the time proposed OCS sale number 40 was under consideration, I was aware that Congress was considering amendments to the Coastal Zone Management Act of 1972, and, in general, the substance of the proposed amendments. I was aware that States would be encouraged to adopt management programs for their coastal areas with the assistance of Federal funds. Such assistance was supported by the Administration and by me, personally. I was aware that under the 1972 Act once State management programs are federally approved, the State certification procedure would apply to OCS activities requiring approval by the relevant Departmental officials. Recent Coastal Zone Management Act amendments apply the State certification procedure at the exploration, development, and production plan stages rather than at the leasing stage or the various permit stages. This new State certification procedure is basically consistent with State review procedures in our current regulations on OCS activities and the special lease stipulations I applied to OCS lease sale number 40.

10. Since development-related OCS facilities will not be needed in an area without existing facilities until 3 to 7 years after leases are issued, I believe there is sufficient time for appropriate management programs to be adopted by the area (State or local) prior to the submission of development plans detailing planned onshore facilities in accordance with Departmental regulations. Each development plan filed with the Department receives an environmental assessment. If the assessment reveals significant environmental impacts not already adequately addressed in a previously prepared environmental impact statement, a new environmental impact statement will be prepared on the development plan.

11. In making the decision to proceed with OCS sale number 40 on June 28, 1976, I was, therefore, fully aware of and considered in detail the environmental consequences of pipeline versus tanker shipment of oil, and the authority of States and local governments to control the location of pipelines and development-related onshore facilities, as well as the identification of those tracts which would be offered for leasing in that sale. With a full comprehension of the future control by States and local governments in this respect, together with the knowledge of when such controls could have effect, i.e., coincidental with the submission of development plans which would be at least three years from the date of this lease sale, I today reaffirm my decision of June 28, 1976.

Thomas S. Kleppe

Attachments

Subscribed and sworn to before me, this
____ day of August, 1976.

Notary Public: _____

My Commission expires: _____

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Mary Spring

being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of April 1977 he served a copy of the within

REPLY BRIEF OF THE FEDERAL APPELLANT

by placing the same in a properly postpaid franked envelope addressed to:

LIST ATTACHED

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

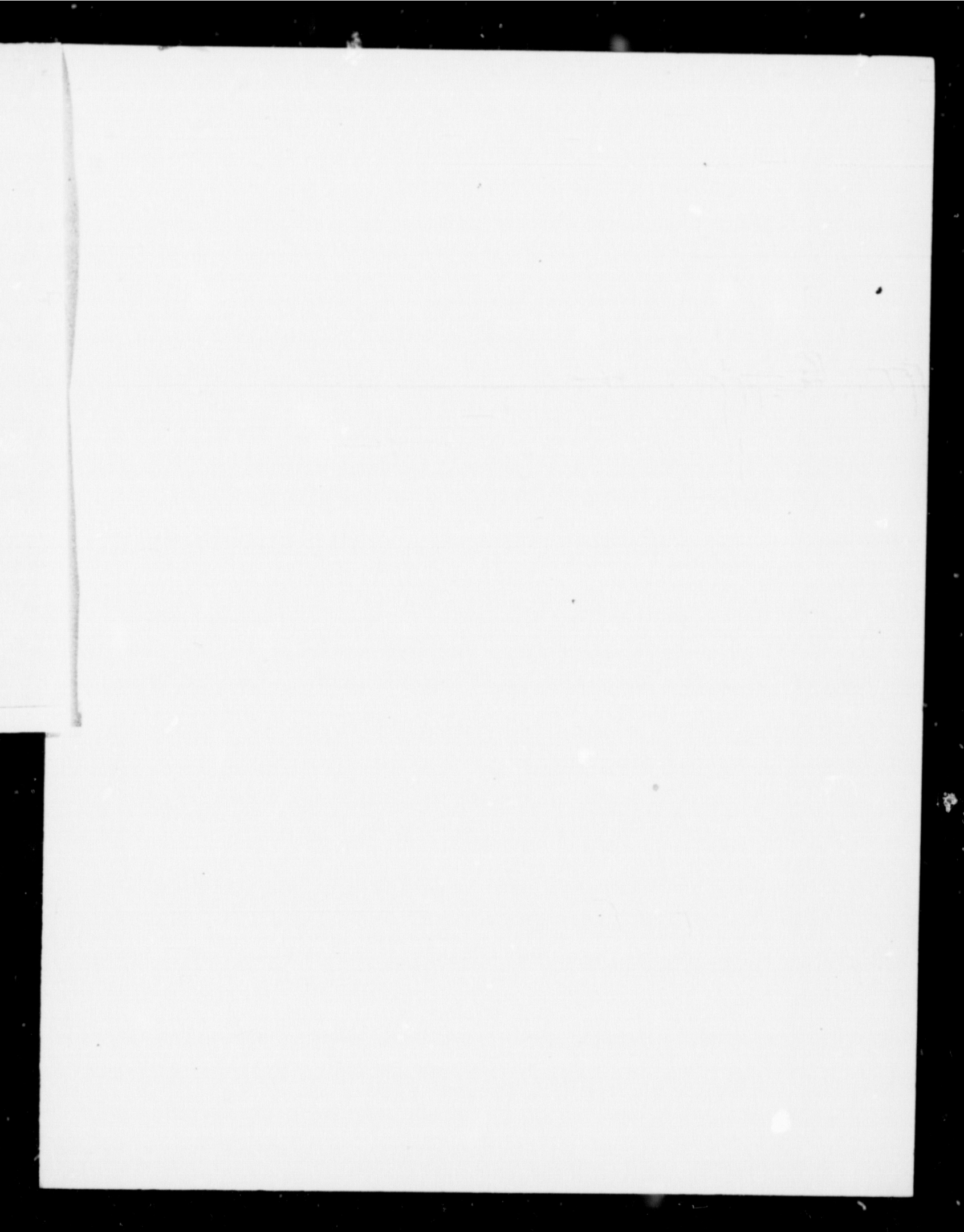
Mary Spring

Sworn to before me this

15th day of April 1977

Stella B. Magier

STELLA B. MAGIER
Notary Public, State of New York
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